IN THE

Supreme Court of the United States

October Term, 1942.

No.....

TITLE INSURANCE AND TRUST COMPANY, a corporation,
Petitioner,

vs.

HARRY C. MABRY, as Executor of the Last Will and Testament of William J. Garland, Deceased, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Summary of Argument.

1. The procedure and course of litigation adopted by the state courts do not satisfy the requirements of due process of law. (*Hansberry v. Lee* (1940), 311 U. S. 32, at 44; *Riley v. N. Y. Trust Co.*, ... U. S. ....., 86 L. ed. 551, 558.)

2. Due process of law requires that the interests of the beneficiaries of a trust be not adversely affected by a court decree unless such beneficiaries be actually or constructively before the court.

3. Where such beneficiaries are unborn or unascertained, their interests cannot be adversely affected by a court decree unless subjected to the court's jurisdiction through the application of principles of virtual representation.

4. Virtual representation requires similarity of motive and inducement between representative and represented.

5. In this case, the alleged representatives, respectively (other than the so-called guardian *ad litem*), obtain personal benefits from the "compromise" at the expense of the unborn. There is, therefore, a lack of similarity of motive and inducement between these alleged representatives and the represented.

6. As an independent proposition, consistently with due process, the living may represent the unborn only in adversary proceedings, not in contractual dealings.

7. The decision of the District Court of Appeal affirming the judgment of the trial court ordering the trustee to comply with the "compromise," modifying the trust and ordering immediate payment of $120,000 of corpus, is a void judgment, lacks the necessary jurisdiction and denies due process of law to the unascertained remaindermen and petitioner, as trustee.

8. Petitioner as trustee is directly affected by such lack of due process.

II.

ARGUMENT.

1. The Procedure and Course of Litigation Adopted by the State Court Do Not Satisfy the Requirements of Due Process of Law.

Where the judgment of a state court, claimed to bind absent parties on the doctrine of virtual representation, is challenged for want of due process, this Honorable Court will examine the course of procedure to ascertain whether those absent parties, whose rights have thus been assertedly adjudicated, have been afforded such notice and opportunity to be heard as are requisite to due process which the Constitution prescribes. (*Hansberry v. Lee, supra,* at p. 40.) This Court will examine to ascertain whether the procedure devised and applied by the state court is such as to insure that those parties present are of the same class and of the same interest as those absent, and that the litigation is so conducted as to insure a full and fair consideration of the common issue. (*Hansberry v. Lee, supra,* at p. 43.) Where the procedure and course of litigation adopted by the state courts do not satisfy these requirements of due process, this Court will set aside the state court judgment. (*Hansberry v. Lee, supra,* at p. 44; *Riley v. N. Y. Trust Co.,* ..... U. S. ....., 86 L. ed. 551, 558.)

2. Due Process of Law Requires That the Interests of the Beneficiaries of the Trust Be Not Adversely Affected by a Court Decree Unless Such Beneficiaries Be Actually or Constructively Before the Court.

It is, of course, fundamental that no rights or interests can be destroyed or adversely affected unless the owner of such rights be given his day in court. Any different holding would be violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

> *Pennoyer v. Neff* (1877), 5 Otto (95 U. S.) 714; *Hansberry v. Lee, supra,* at p. 40.

There is no exception to this principle where the interests are owned by unborn or unascertained beneficiaries. Those interests can no more be destroyed constitutionally without a day in court than those of the living.

> *McArthur v. Scott* (1884), 113 U. S. 340, at 391-392, 393-395.

3. Where Such Beneficiaries Are Unborn or Unascertained, Their Interests Cannot Be Adversely Affected Unless Subjected to the Court's Jurisdiction Through the Application of Principles of Virtual Representation.

The rule is that when justiciable issues are presented to a court, affecting the interests of unborn and unascertained persons, and there are living parties before the court whose interests are so substantially identical in quality and quantity and are adversely affected by the proceedings in so similar a manner to those unborn and unascertained that they have the same stimulus to act

in the treatment of their interests as would such unborn or unascertained persons, then, and only then, can the interests of the unborn or unascertained be bound by the court decree.

See:

Hansberry v. Lee, supra, at pp. 41, 43, 44;

McArthur v. Scott, supra, at p. 394;

Note 120, *A. L. R.* 876;

F. C. Roberts, *"Virtual Representation in Actions Affecting Future Interests"* (1936), 30 Ill. L. Rev. 580-581.

4. Virtual Representation Requires Similarity of Motive and Inducement Between Representative and Represented.

The essential element in every case involving virtual representation is that the motive and inducement between the representative and represented must be identical or substantially similar. There are numerous cases in which decrees entered years before have been held entirely void because the persons purportedly representing the unborn have had interests dissimilar to theirs. (See *McArthur v. Scott, supra,* where this Honorable Court in 1884 held void a decree entered in 1839, thus affecting all titles to property depending upon the former decree for almost fifty years.)

In *Hansberry v. Lee, supra,* this Honorable Court, at page 45, held that representation by persons "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

5. No Such Similarity Was Present in This Case Between Those Claimed to Be Virtual Representatives and the Unborn and Absent Remaindermen.

In view of the foregoing established principles of constitutional law, it is necessary to examine the relationships of each of the persons claimed in this case and found by the court below to be the representatives of the unascertained and absent remaindermen.

The only living actual or potential beneficiaries of the trust were William Garland, Alzoa, the four minor children and Garland's then wife and daughter who would have been his heirs at law had he then been deceased. R. 542-543. These were all parties to the litigation, and all joined in the petition for compromise. R. 540-541. As far as the settlor and the so-called "presumptive heirs" are concerned, it was conceded below by all parties that they had interests definitely adverse to the remaindermen and could not represent them. R. 605. This leaves only Alzoa, the four minor children and (assertedly) the trustee, as possible virtual representatives.

(a) Alzoa Was Adversely Interested and Could Not Represent the Absent Remaindermen.

Alzoa, like the settlor, *is to receive outright the sum of $60,000 from that corpus to which she had not the remotest interest under the trust.* In addition, she receives 37½% of the income for her life, in lieu of the sum of $1,250 per month awarded to her by the trust provisions. Should the trust produce an average return of four per cent per annum, a modest expectation over a long period of years, Alzoa would be far ahead on payments of income alone. The dissimilarity of interest between Alzoa and

the remaindermen as to the advisability of the compromise is conclusively apparent. Her gain by the compromise was, as to *corpus*, precisely the same, $60,000, as that of the *plaintiff*. As to income, the result was that both Alzoa and the *plaintiff* were to receive 37½%. The plaintiff was concededly disqualified as a virtual representative. Since they each raided the interest of the unborn to an equal extent, Alzoa's disqualification is equally obvious.

(b) The Four Minor Children Were Adversely Interested and Could Not Represent the Unborn and Absent Remaindermen.

The District Court of Appeal rested its determination that the unborn remaindermen were bound by the doctrine of virtual representation, in the main, by the consent to the compromise of the four minor children. In so holding, the District Court of Appeal demonstrated, we submit, that it did not give proper consideration to the fundamental requirement that representation can only exist where *similar inducements* can fairly be expected to motivate the representative and the represented. It is not sufficient that the parties have no direct hostility toward each other. *It is imperative that they must have the same impelling reasons for acting.*

Under the original trust it was provided that certain specific monthly payments, ranging from $500 per month during the first five years, to $1250 per month for the fourth five years, were to be paid to Alzoa for the support and maintenance of these minors, the eldest of whom was eight years old at the time the trust was established. After the end of that twenty-year period *no payments of any kind* were to be made from the trust to or for the benefit of these children, *until the death of William Garland, whenever that might be.*

At the time the petition for compromise was filed less than twelve years remained of this twenty-year period; whereas Mr. Garland then had a normal life expectancy of about *twenty-five years*. Consequently, the four minors were faced with a period of thirteen years during which they were to receive no income whatever.* While that period might be shortened by Garland's earlier death, it might, with equal reasonableness, be very much longer, should he live past his expectancy. In the event he should outlive the minors, they would never receive any part of the income or *corpus* from the trust after the limited payments for their support and maintenance ceased.

By the compromise all this was changed. The four minors became *immediately vested for their respective lives* with an aggregate of 25% of the trust income, which was to be increased to 62½% upon Alzoa's death. There was no longer *any possibility whatsoever* of these minors having to face an undetermined period of years in which they would receive no income. This very feature of security of income was urged upon the lower court in the petition for compromise as being a special benefit to the minors accruing therefrom. R. 555-556.

The District Court of Appeal in its opinion "assumed" that "by the compromise the living children received income not provided by the original trust." R. 606. In spite of this, and the conceded *loss* to the remaindermen of $120,000, that court held that the children *represented* the remaindermen so as to bind the interests of the latter to the contract of compromise by reason, as it says, of

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*Rather than being a "remote" contingency, as stated by the District Court of Appeal [R. 607], this was the probability of actuarial tables.

"the decisive fact * * * that the remaindermen had no interest in the *income;* the living children had no interest in the *corpus* * * *." R. 607.

We respectfully submit that there is no "decisive fact" establishing virtual representation arising out of this situation. If the children, as the District Court of Appeal admits, *gained* by the compromise an addition to the only portion of the trust in which they had an interest—the income—and the remaindermen *lost* a substantial sum from the *corpus in which the children concededly had no interest,* it cannot possibly be contended that the children's motive and inducement to favor or oppose the compromise was identical with that of the remaindermen.

Consequently, the fact that the portion of the *corpus* taken from the unborn under the compromise went directly to Garland and Alzoa only, is wholly immaterial. The important thing is that the children naturally viewed the compromise, quite aside from the benefit derived from the dismissal of the litigation, as otherwise advantageous to them. They were not faced with the burden of weighing on the one hand the loss of $120,000 from the *corpus* and on the other the dismissal of the lawsuit, as a member of the class of remaindermen would have been. They desired the benefits accruing to them from the compromise and had no particular interest in seeing that the unborn remaindermen's *corpus* remained intact or was cut down as little as possible. As a result, the entire basis for postulating virtual representation on their consent must inevitably fail.

6. The Implication of the District Court of Appeal That a Trustee May Represent Some Beneficiaries as Against Others so as to Bind Them to a Compromise to Which the Trustee Refuses to consent Only Serves to Emphasize the Lack of Due Process Herein.

Respondents have argued throughout this litigation that, absent any other ground of jurisdiction over the remainder interests, such jurisdiction was gained by the presence in the litigation of this trustee. While declaring that "it is not necessary to go into this question to any particular extent," the opinion of the District Court of Appeal [R. 609] states that "there is strong authority for the statement that if it were necessary in order that justice might be done to living parties, the interests of contingent remaindermen in this trust estate could be represented by the trustee." The implication of this statement is that the trustee represents the remaindermen in the "compromise."

Obviously, the compromise, being a contract, requires the voluntary consent of all parties thereto. This trustee has at all times refused to consent. If respondents here desire to depend on the trustee for jurisdiction by representation, they must accept the trustee's refusal to consent, and the compromise fails for want of consenting parties insofar as it purports to affect the property of the remaindermen. The judgment below cannot be supported on any ground of virtual representation of the unborn remaindermen in the "compromise" on any claim

that the trustee is the representative of those absent parties in view of the trustee's refusal to enter into the contract of compromise.

Aside from all this, however, it is settled law in California—and the opinion of the District Court of Appeal does not purport to refute it—that in a controversy between a settlor and beneficiaries, such as this case was, *the trustee is in no sense the representative of either faction.*

> *Hutchins v. Security Trust & Savings Bank* (1929), 208 Cal. 463.

Accord:

> *Lake v. Dowd* (1929), 207 Cal. 290;
> *Mitau v. Roddan* (1906), 149 Cal. 1;
> *O'Connor v. Irvine* (1887), 74 Cal. 435.

On the other hand, it is equally well settled in California that a trustee may and should point out to the Court, in appropriate cases, that the interests of absent beneficiaries are being vitally and substantially affected. *Gray v. Union Trust Co.* (1915), 171 Cal. 637, 639. This course, which petitioner has followed throughout the case, is the exact antithesis of virtual representation. The failure of the District Court of Appeal to recognize this distinction only serves to emphasize the lack of due process complained of.

7. The Statement by the District Court of Appeal That the Court Had Inherent Power to Appoint a Guardian Ad Litem Does Not Support Any Claim of Representation From That Source.

In his effort to find some basis on which to bind the unborn and unascertained remaindermen to the compromise, under which he received such substantial returns at their expense, plaintiff devised a wholly novel procedure. R. 574. By his *ex parte* petition, plaintiff procured an order purporting to appoint a guardian *ad litem* to represent the unborn and unascertained remaindermen. This appointment was not sought until after plaintiff had amended his complaint to ask for a "revision, reformation and modification" of the trust so as to give him the exact benefits which he subsequently received by the compromise; and it was obviously and expressly for the purpose of representation in such compromise. R. 578-580.

The "guardian *ad litem*" joined in the petition for compromise and appeared at the hearing thereon. R. 540; 535-537. Both there and in the briefs before the District Court of Appeal, plaintiff urged that jurisdiction over the interests of the unborn was acquired by this most novel example of pulling oneself up by one's bootstraps.

In its treatment of this unprecedented proceeding, the opinion of the District Court of Appeal is again dangerously obscure. It merely says R. 608:

> "To aid it in the exercise of its jurisdiction to hear and determine this matter, the court appointed a guardian *ad litem* to represent and protect the interests of the contingent remaindermen. Courts of justice as an incident of their jurisdiction have inherent power to appoint guardians *ad litem*."

In so stating we submit that the District Court of Appeal has simply multiplied confusion. The inherent power of a court of equity to appoint a guardian *ad litem* for *living persons* referred to in the two California cases cited by the court in support of its statement* can only be exercised *after* the court has obtained jurisdiction of such persons by the service of process upon them. If such jurisdiction has not been obtained, the appointment is void. (*Akley v. Bassett* (1922), 189 Cal. 625; *Johnston v. San Francisco Savings Union* (1883), 63 Cal. 554.)

In this case plaintiff is asserting that the appointment itself and the appearance of the guardian *created* the jurisdiction over the persons of the unborn. We believe that in no case, in the absence of statute authorizing such procedure (and, as we have seen, California has none save in Torrens Title Proceedings) has any court appointed a guardian *ad litem* unless it first had procured jurisdiction of the persons or their interests by ordinary means.

The present attempt to innovate a procedure without prior statutory authority by simply having one of the interested persons petition and nominate a lawyer to represent the unborn interests and thus gain power to destroy them, is wholly subversive of established principles of due process of law. Certainly the obscure statement in the opinion of the District Court of Appeal last above quoted does not support the fundamental requirement of jurisdiction essential to the rendition of a valid judgment

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Crawford v. Neal, 56 Cal. 321 (1880); *in re Cahill*, 74 Cal. 52 (1887), each relating to the appointment of guardians *ad litem* for minor plaintiffs.

when drawn into question as denying due process. This evasive statement may not be used to cover the inherent unfairness in this proceeding and the fundamental denial of due process of law in attempting to force this compromise upon and at the expense of the absent parties.

8. Consistent With Due Process of Law, Living Persons May Represent Unborn and Absent Parties Only in Adversary Proceedings, Not in Contractual Dealings.

The principles of virtual representation, when properly applied, permit the court to *adjudicate on controverted issues presented to it.* Virtual representation does not warrant or justify living parties in *contracting* away, instead of *defending,* the interests of the unborn and absent parties.

The District Court of Appeal opinion in stating the applicable rule of virtual representation repeatedly describes that rule in connection with defending litigation. For example, saying [R. 604] "when rights of living persons in ordinary common sense *ought to be adjudicated,*" and [R. 608] saying that the court "had the right and it was its duty to *adjudicate* this case," and [R. 608] "to *adjust all the differences* arising from the cause of action presented." However, this was not what was done in this case. The court did not *adjudicate* any of the issues presented in the litigation nor did it *adjust* any of the differences between the parties to that litigation. The living beneficiaries themselves, for reasons suf-

ficient unto themselves, entered into an agreement modifying the trust, under which each living party received a present or potential improvement in his or her position under the trust. The consideration making this agreement possible came directly from the *corpus* and went not only to the plaintiff but to the other living defendants. The only reason for the presentation of the compromise to the court was in an attempt to bind these unborn through so-called "representation" by the very parties who had made this agreement.

As far as those parties who were *sui juris* were concerned, the court had neither power nor right to require them to make or to prevent them from making any compromise. As far as the living minors were concerned, the requisite statutory approval could have been equally as well rendered by the court supervising their guardianship estates as by the court sitting in equity. Hence, there was in this case no room for the application of the principles of virtual representation in order that contested issues between the living be adjudicated. What was done was to permit the application of the principles, not in any litigation, but in consensual bargaining, and this, despite the fact that it is settled law in California that persons not before the court cannot be bound by consent decrees under the doctrine of virtual representation. *County of Los Angeles v. Winans* (1916), 13 Cal. App. 234, at 255.

We respectfully submit that the bargaining away by contract of the rights of absent parties by living persons who receive benefits therefrom, is so inherently unfair as to be wholly repugnant to the requirements of due process of law.

9. The Rights of Petitioner Are Directly Affected by the Lack of Due Process Complained of Herein.

Absent the compromise decree affirmed by the District Court of Appeal, it would be the duty of petitioner, as trustee, to have on hand for payment over to the remaindermen at the termination of the trust, the $120,000 in corpus directed by the decree to be turned over to the income beneficiaries.

Under the trust indenture, that $120,000 belongs absolutely and unconditionally to the absent remaindermen (subject only to deferment of their possession thereof). The decree directs the immediate withdrawal and payment thereof to income beneficiaries who, under the trust indenture, have no possible right or interest therein. Since the trust indenture is the charter of the trustee's powers and duties, such withdrawal and payment will subject it to liability—*personal* liability—to the remaindermen.

If the decree resulted from due process of law, the remaindermen would be bound thereby and the trustee protected in making such withdrawal and payment. But if (as the trustee has contended throughout) the procedure below was lacking in due process as to the remaindermen, the trustee will be compelled, at termination of the trust, to restore that $120,000 to corpus *out of its own funds*. Thus the trustee, petitioner herein, has a direct financial interest to the extent of at least $120,000 in the determination of this question. For this reason the trustee's own property is being taken without due process of law.

Accordingly, this case is not to be distinguished in principle from that of *Buchanan v. Warley* (1917), 245 U. S. 60, 62 L. Ed. 149 (where a *white* vendor was per-

mitted to raise the constitutional deficiencies of an ordinance prohibiting occupation by a *colored* vendee.) The court there stated, at page 73 (160):

> "This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved."

To the same effect is the case of *Truax v. Raich* (1915), 239 U. S. 33, 60 L. Ed. 131, where an *employer* was permitted to test the constitutionality of a statute limiting the employment of aliens.

It is therefore respectfully submitted that the lack of due process herein complained of directly and inevitably affects the property right of petitioner to carry on its business as a trustee without having an unassumed liability foisted upon it in the manner shown by the record herein.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the District Court of Appeal of the State of California should be granted.

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